DOCUMENT RESUME

ED 340 117 EA 023 550

AUTHOR Mawdsley, Ralph D.
TITLE Employees.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE 91
NOTE 36p.; In: Thomas, Stephen B., Ed. The Yearbook of Education Law, 1991, p1-35. (See EA 023 549).
PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Certification; Civil Liberties; Contracts; *Court Litigation; Dismissal (Personnel); Due Process; Elementary Secondary Education; *Employer Employee Relationship; *Equal Opportunities (Jobs); Legal Responsibility; *Public Schools; Reduction in Force; *School Law; *School Personnel; Teacher Rights; Tenure

ABSTRACT

This chapter covers over 200 cases reported in 1990 involving precollegiate, public-sector employees. Those cases where procedural issues are involved are omitted, and procedural issues in the remaining cases are deemphasized. Unlike many years in the past, 1990 saw no Supreme Court cases related to school employment. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline contains the largest group of cases, with many revolving around the issue of board compliance with district and state policies. Legal issues covered by the review are organized in the following sections: (1) discrimination in employment by race, religion, sex, age, national origin, or handicap; (2) substantive constitutional rights including freedom of speech and association, along with issues of privacy and substantive due process; (3) procedural due process; (4) issues of dismissal, nonrenewal, demotion, and discipline (for insubordination, unprofessional conduct, unfitness, immorality, or incompetence); (5) reduction in force and involuntary leaves of absence; (6) contractual disputes; (7) tenure; and (8) certification, decertification, revocation, and suspension. (MLF)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED 401 012

1

EMPLOYEES

Ralph D. Mawdsley

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN **OTHER THAN PAPER COPY** HAS BEEN GRANTED BY

F. Delon

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)"

Introduction / 2
Discrimination in Employment / 2
- Race / 3
- Religion / 5
- Sex / 5
- National Origin / 7
- Age / 7
- Handicap / 9

Substantive Constitutional Rights / 9
- Speech / 9
- Association / 11
- Religion / 12
- Privacy / 12
- Substantive Due Process / 12

Procedural Due Process / 13
- Liberty and Property Interests / 13
- Aspects of Notice / 15
- Aspects of Hearing / 16

Dismissal, Nonrenewal, Demotion, and Discipline / 17
- Insubordination / 17
- Unprofessional Conduct, Unfitness, Willful Neglect of Duty / 18
- Immorality / 19
- Incompetency / 20
- Compliance with School Board Policies and State Statutes / 20

Reduction-in-force and Involuntary Leaves of Absence / 25
- Necessity for Reduction-in-force / 26
- Elimination of Position / 26
- Selection of Employees / 27
- Realignment/Reassignment / 27
- Call-back Rights / 28

Contract Disputes / 29
- Board Policies and Contract Stipulations / 29
- Administrative Regulations and Statutory Provisions / 31

Tenure / 32
- Tenure Status / 32
- Tenure by Default or Acquiescence / 33

Certification / 33
- Certification Standards / 33
- Decertification, Revocation, or Suspension / 34

EA 023 550

BEST COPY AVAILABLE

INTRODUCTION

This chapter covers over 200 cases reported in 1990 involving precollegiate, public-sector employees. The review excludes those cases analyzed in other sections of the *Yearbook* (e.g., higher education, collective bargaining). Those cases where procedural issues are involved are also omitted, and procedural issues in the remaining cases are deemphasized. Unlike many years in the past, 1990 saw no Supreme Court cases related to school employment; however, where Supreme Court cases from prior years are necessary for an understanding of current cases, they are mentioned. As in previous years the section on dismissal, nonrenewal, demotion, and discipline contains the largest group of cases, with many revolving around the issue of board compliance with district and state policies.

DISCRIMINATION in EMPLOYMENT

Discrimination claims can be based on a number of federal statutes, the most prominent of which is title VII of the Civil Rights Act of 1964.[1] Title VII prohibits both public and private institutions from discriminating on the basis of race, color, religion, sex, and national origin. Additionally, gender-based discrimination is prohibited by title IX of the Education Amendments of 1972[2] and gender-based discrimination is prohibited by the Equal Pay Act of 1963.[3] Discrimination against employees aged forty or older is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA)[4] and discrimination against "otherwise qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.[5] Discrimination based on national origin and race is prohibited by section 1981 of the Civil Rights Act of 1866.[6] Discrimination complaints may also be pursued under section 1983 of the Civil Rights Act of 1871 which protects both constitutional and statutory rights.[7]

However, civil rights complaints must satisfy both procedural and substantive requirements before a complainant will have any possibility of success. One of the basic requirements is that complaints must be filed within the appropriate statute of limitations. Thus, teachers who had received lay-off notices on March 2, 1982, but who failed until after the

1. 42 U.S.C. § 2000 *et seq.*
2. 20 U.S.C. § 1681 *et seq.*
3. 29 U.S.C. § 206 (d)(1).
4. 42 U.S.C. § 1601 *et seq.*
5. 20 U.S.C. § 794 *et seq.*
6. 42 U.S.C. § 1981.
7. 42 U.S.C. § 1983.

six-year statute of limitations had expired to file their reverse discrimination complaint based on an affirmative action plan excluding 20% of the positions from seniority bumping procedures, lost their cause of action when they did not file their civil rights lawsuit until May 11, 1988.[8] Likewise, discrimination suits may be subject to constitutional limitations. A sex discrimination suit brought in a Utah state court against a school district had to be dismissed under the eleventh amendment to the Constitution because the state legislature, through the state board of education, exerted control over school policies and programs and contributed to and oversaw funding of public schools. Furthermore, a possibility existed that a judgment against the school district would be paid at least partially from state funds.[9] The single most basic requirement for the civil rights complainant is stating a *prima facie* case. Thus, a black, female employee over fifty who alleged she was doing "exemplary" work when she was demoted from school principal to classroom teacher and who alleged the principalship was filled by a younger white male stated a *prima facie* case for race, sex, and age discrimination under title VII.[10]

Race

The majority of complaints alleging race discrimination under a variety of legal theories were resolved in favor of defendant school districts. A black employee discharged from his job had no claim under the thirteenth amendment since that amendment creates no independent cause of action based on race.[11] A black speech and language pathologist who had not been admitted to the school district's Principal Trainee Program, a requirement for advancement to assistant principal or principal, had not been retaliated against for having filed EEO complaints where none of the persons reviewing her application to the Program knew of the discrimination complaints.[12] A rejected black candidate for a position of assistant high school principal failed to raise a reasonable inference of pretext regarding the school district's reason for nonemployment that he had not performed as well as a white candidate in the interview process.[13] A teacher failed to establish race or gender discrimination where she had failed to apply for an open position and where, even had she applied, she lacked the necessary certification.[14] A school board assignment policy pursuant to

---

8. Kuemmerlein v. Board of Educ. of Madison Metro. School Dist., 894 F.2d 257 (7th Cir. 1990).
9. Martinez v. Board of Educ. of Emery County School Dist., 724 F. Supp. 857 (D. Utah 1989).
10. Nelson v. School Bd. of Palm Beach County, Fla., 738 F. Supp. 478 (S.D. Fla. 1990).
11. Doffoney v. Board of Trustees for Beaumont Indep. School Dist., 731 F. Supp. 781 (E.D. Tex. 1989).
12. Featherson v. Montgomery County Pub. Schools, 739 F. Supp. 1021 (D. Md. 1990).
13. Morton v. City School Dist. of City of N.Y., 742 F. Supp. 145 (S.D.N.Y. 1990).
14. Chambers v. Wynne School Dist., 909 F.2d 1214 (8th Cir. 1990).

specific state and federal directives to integrate public school faculties and staffs by establishing minimum and maximum ranges for black representation in the faculty of each school was reasonable and a strict scrutiny standard did not apply to an equal protection challenge to the policy.[15] A black custodial employee discharged after pleading guilty to a misdemeanor count of possession of marijuana was not the victim of race discrimination where three other white employees similarly situated had been discharged for drug offenses.[16]

However, a school district victory will not necessarily impose a penalty on the unsuccessful civil rights complainant. Summary judgment for a defendant school district in a race discrimination case did not warrant Rule 11 sanctions for attorney fees and costs against plaintiffs or their attorneys even though the EEOC had made determinations for the defendant and plaintiffs had failed to pursue discovery to attempt to find evidence of intent to discriminate. Because of the salutory purpose served by laws that seek to ameliorate racial discrimination "disincentives to their invocation should be erected only with care."[17]

In a case involving a shifting burden of proof, presentation of evidence by a black complainant that school district reasons for its employment decision were pretextual, should have entitled the district to a further opportunity to present additional evidence to meet its preponderance of evidence burden of proof that its reasons were not pretextual. As a result, this case was remanded to provide the school district just such an opportunity.[18]

Successful race discrimination complainants have tended to prevail where they have been able to prove that the school district reasons for employment decisions were pretextual or disparately impacted employees on a racial basis. A discharged black custodian prevailed in his title VII disparate treatment case by persuading the court through the credibility of his own testimony, as opposed to that of the building principal and his two co-workers, that the school district's proffered reason of insubordination for discharging him was pretextual; similar insubordination by the other two co-workers had been treated differently than for the black discharged employee.[19] A black nontenured former school band director was able to establish a title VII disparate impact claim after he had been dismissed following a criminal charge of possession of two marijuana cigarettes, but was not reinstated when the criminal charges were eventually dismissed. Two white teachers who in the past had been charged with misde-

---

15. Vaughns v. Board of Educ. of Prince George's County, 742 F. Supp. 1275 (D. Md. 1990).
16. Doffoney v. Board of Trustees for Beaumont Indep. School Dist., 741 F. Supp. 125 (E.D. Tex. 1990).
17. Tutton v. Garland Indep. School Dist., 733 F. Supp. 1113, 1118 (N.D. Tex. 1990).
18. Jamison v. Rockaway Township Bd. of Educ., 577 A.2d 177 (N.J. Super. Ct. App. Div. 1990).
19. Quincy School Dist. No. 172 v. Human Rights Comm'n, 555 N.E.2d 21 (Ill. App. Ct. 1990).

meanor offenses of shoplifting and driving under the influence had each been given a second chance by the school board and had been reinstated. However, the nontenured plaintiff was entitled to only one year's back pay and no front pay. Moreover, he was not entitled to reinstatement because reinstatement some seven years after his 1982 dismissal would "result in displacement of an innocent third party who is presently the band director."[20]

In a case involving more substantial penalties for discrimination, two assistant varsity football coaches (one Caucasian and the other Hispanic), removed from the varsity team and assigned to the sophomore team to make room for two black coaches, were found to have been discriminated against on the basis of race. Although each coach received only $1.00 damages for an equal protection violation, each also received $5,000 damages for mental anguish, as well as costs and attorney fees. Injunctive relief was granted to one plaintiff who had requested reassignment but not to the other who had withdrawn his request.[21] In a similar case a white social worker, discharged as part of a RIF during which the school district had elected to retain a less-senior black social worker, was entitled to back pay under her successful title VII lawsuit.[22]

In an unusual case involving an informal nepotism policy, a school district's nepotism practice in filling teaching positions without advertising, with the result that most positions were filled by white applicants, had a disparate impact on potential black applicants and warranted a prospective injunction against the practice.[23]

Religion

Only one case was reported in this section. A teacher who had worn a head wrap as an expression of her religion could be discharged for refusing to abide by the school's dress code for faculty and students, but was nonetheless entitled to unemployment compensation benefits because her head wrap was a protected "form of both religious and cultural expression."[24]

Sex

Complainants were about evenly divided between success and failure in sex discrimination cases. A federal district court had no jurisdiction to hear a title VII complaint based on alleged sex discrimination where the

---

20. Daniels v. City of Alcoa, 732 F. Supp. 1467, 1478 (E.D. Tenn. 1989).
21. Covington v. Beaumont Indep. School Dist., 738 F. Supp. 1041 (E.D. Tex. 1990).
22. Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431 (10th Cir. 1990).
23. Thomas v. Washington County School Bd., 915 F.2d 922 (4th Cir. 1990).
24. Mississippi Employment Sec. Comm'n v. McGlothin, 556 So. 2d 324 (Miss. 1990).

complainant waited fourteen months after her notice of nonrenewal to file a complaint, long after the 180 days required under title VII.[25] A female teacher failed to establish a *prima facie* case of sex discrimination where she had been denied extension of educational leave and relief from administrative assignment while two male teachers had been granted such leaves and relief. The court noted, however, that the female teacher was not seeking an initial leave, that the needs of the departments were different, and that she had already been granted administrative relief following return from her leave which had been without precedent.[26]

In a reverse discrimination case, a school district decision to hire a female over a male was upheld. The school proffered a legitimate, nondiscriminatory reason for hiring a female over a male because the female had work experience in the area needed even though the male's academic degree was in the advertised degree area while the female's was not, and because the female performed better during the job interview in responding to questions.[27]

Complainants were successful in a number of cases involving benefits, disparate impact, harassment, and amount of damages. In a case of some importance, the Third Circuit has determined that a provision in a collective bargaining agreement allowing only female teachers one year's leave without pay for childbearing contravened title VII and was thus *per se* void to the extent it granted leave beyond the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions.[28] In a case involving an individual teacher, a female teacher denied an administrative position stated a *prima facie* case of sex discrimination because she had greater seniority than men hired for the position and because she presented evidence of statistical gender disparity between teachers and administrators.[29] In a case broadening evidence permitted in sex discrimination cases, a female employee alleging both gender discrimination and unlawful retaliation was permitted to introduce evidence regarding specific complaints of sexual harassment against other employees to attempt to establish an atmosphere of condoned sexual harassment in the work place, thereby increasing the likelihood of retaliation for complaints in individual cases.[30] In a case of significance for damages determination, a female teacher, who a federal appeals court determined had been intentionally discriminated against under a disparate impact theory for at least four of eight administrative positions for which she had been denied, was entitled

25. Kapusta v. Rockwood Area School Dist., 732 F. Supp. 567 (W.D. Pa. 1989).
26. Baker v. Board of Educ. of the West Irondequoit Cent. School Dist., 550 N.Y.S.2d 762 (App. Div. 1989).
27. Collins v. School Dist. of Kansas City, Mo., 727 F. Supp. 1318 (W.D. Mo. 1990).
28. Schafer v. Board of Pub. Educ. of the School Dist. of Pittsburgh, 903 F.2d 243 (3d Cir. 1990).
29. Perilli v. Board of Educ. Monongalia County, 387 S.E.2d 315 (W. Va. 1989).
30. Hawkins v. Hennepin Technical Center, 900 F.2d 153 (8th Cir. 1990).

to both back pay and front pay. The difficulty in calculating the damages because of the numerous positions involved and the varying salaries of each position was not a sufficient reason to deny relief and, due to the intentional nature of the discrimination, "any ambiguities in the amount of salary owed [plaintiff] should be resolved against the school."[31] On remand, the teacher's measure of damages of front pay was determined to consist of the difference between the teacher's current salary and the salary of a junior high school principal, until such time as she could be placed into the position of principal.[32]

National Origin

This form of discrimination appears to be seldom litigated; but employees prevailed in two reported cases and lost in one. Where a terminated employee appearing *pro se* and, alleging national origin discrimination, named her supervisors rather than the school board as defendants in her title VII suit, the district court improperly had refused to permit her request to amend her complaint since the school board's attorney was already handling the defense and the board would not therefore be adversely affected.[33] An English teacher of Chinese descent who had not been selected as department chairperson stated a civil rights cause of action against a black high school principal who selected a black female. The two-year statute of limitations under state law did not begin to run until the rejected teacher received written notice of his nonselection in September 1987 and thus his complaint filed August 17, 1989 was timely.[34] A naturalized American of Asian descent who had been turned down for a promotion to the position of printer in favor of a black employee lost in his title VII claim when he was unable to prove that the employer's reason for not promoting him was pretextual. The employer viewed both persons as equally qualified but selected the black employee because he had worked for the acting director the previous summer and the acting director had been impressed with the way he had handled responsibilities.[35]

Age

Complainants alleging age discrimination met with mixed success. All but one of the cases decided against complainants were resolved on procedural grounds. Teachers who had failed to pass a compulsory state-

31. Willis v. Watson Chapel School Dist., 899 F.2d 745, 747 (8th Cir. 1990).
32. Willis v. Watson Chapel School Dist., 749 F. Supp. 923 (E.D. Ark. 1990).
33. Santiago v. Wood, 904 F.2d 673 (11th Cir. 1990).
34. Wohl v. Cleveland Bd. of Educ., 741 F. Supp. 688 (N.D. Ohio 1990).
35. Silpacharin v. Metropolitan Gov't of Nashville and Davidson County, 797 S.W.2d 625 (Tenn. Ct. App. 1990).

administered certificate examination could not be considered to be state employees under the Fifth Circuit's hybrid economic realities common law control test so as to enable them to maintain an ADEA action.[36] An employee who had filed an ADEA complaint was time-bound from filing a state tort claim for wrongful discharge and outrage based on discriminatory acts where the tort claim was filed more than three years after her resignation. The statute of limitations would not be tolled on equitable principles where the employee was aware of factual elements of age discrimination at the time she filed her ADEA complaint.[37] Comparing an age discrimination case to cases involving title VII or section 1983, a federal appeals court refused to appoint an attorney for a complainant where there was no more likelihood of successful litigation by the same complainant than in the past and where complainant had demonstrated adequate ability in past litigation to represent himself.[38] A three-year collective bargaining agreement which had a one-time early retirement incentive, later eliminated in the next three-year agreement, did not discriminate against a teacher on the basis of age. "[U]nless [an] employee benefit plan has the purpose and effect of retaliating against employees who have filed age discrimination claims, or of discriminating among employees in terms of salaries, hiring practices, or other nonfringe benefit areas, a *bona fide* retirement plan which makes age-based distinctives does not violate the ADEA."[39]

Successful plaintiffs in several ADEA cases have been victorious in situations involving changes in contracts, nonhires, and the exclusiveness of a state law remedy. A school which changed an instructor's employment contract from "continuing" to "annual" when he turned seventy violated ADEA by depriving the instructor of tenure.[40] A female teacher, who had been turned down for two administrative positions, both of which had been filled by younger men and who had been awarded damages of $76,383 equal to lost pay under ADEA, was entitled to reinstatement or front pay.[41] In a procedural case involving the interfacing of state and federal law, a federal district court determined that existence of a state law remedy for breach of an employment contract did not preclude an ADEA action.[42]

---

36. Fields v. Hallsville Indep. School Dist., 906 F.2d 1017 (5th Cir. 1990).
37. Douchette v. Bethel School Dist. No. 403, 795 P.2d 162 (Wash. Ct. App. 1990).
38. Salmon v. Corpus Christi Indep. School Dist., 911 F.2d 1165 (5th Cir. 1990).
39. Gabarczyk v. Board of Educ. of City School Dist. of Poughkeepsie, 738 F. Supp. 118, 121 (S.D.N.Y. 1990).
40. EEOC v. School Bd. of Pinellas County, Fla., 742 F. Supp. 622 (M.D. Fla. 1990).
41. Farber v. Massillon Bd. of Educ., 917 F.2d 1391 (6th Cir. 1990).
42. Pack v. O'Quinn, 747 F. Supp. 358 (E.D. Ky. 1990).

Handicap

Handicap has been a limited cause of action, and has resulted in differing conclusions. A school district discriminated against a school bus driver on the basis of physical handicap when it assigned him to a newly created position of night custodian which, because of the heavier physical demands upon his heart, caused him to resign.[43] A school principal, whose contract was nonrenewed for a variety of reasons, including economic factors, a lack of proper certification, and alcohol-related problems, failed to state a *prima facie* case under the Rehabilitation Act because he was not excluded from his position "*solely by reason of his handicap.*"[44]

SUBSTANTIVE CONSTITUTIONAL RIGHTS

Speech

A majority of cases involving free expression were decided in favor of school employees. Statements by a superintendent of schools in support of a particular slate of candidates for election to the school board was a matter of public concern and was thus constitutionally protected, even though he may have been motivated in part by a desire to retain his job through the election of candidates who favored retaining him.[45] A nontenured, noninstructional employee-at-will, who was transferred at the same salary from her position of secretary to an elementary school principal to a newly created, menial, make-work position after she had transferred her daughter from the public school to a private, all-white school, had her free speech and family privacy rights violated. She was entitled under section 1983 to at least nominal damages of $1.00.[46] Two persons holding central office administrative positions, one of which ran unsuccessfully against the school superintendent in his reelection and the other who, while serving on the county commission, voted to audit the superintendent's reimbursements, were entitled to reinstatement and back pay after the superintendent had reassigned them to teaching positions, thus acting in retaliation for their exercise of free speech.[47] A nontenured teacher who had been nonrenewed was entitled to a jury trial as to whether the teacher's first amendment conduct was the motivating factor in her nonrenewal. In this case the court found that the teacher's refusal to retract school newspaper

43. Casino v. Mahopac Cent. School Dist., 741 F. Supp. 1028 (S.D.N.Y. 1989).
44. Pierce v. Engle, 726 F. Supp. 1231, 1234 (D. Kan. 1989) (emphasis in original).
45. Kinsey v. Salado Indep. School Dist., 916 F.2d 273 (5th Cir. 1990).
46. Fyfe v. Curlee, 902 F.2d 401 (5th Cir. 1990).
47. Bundren v. Peters, 732 F. Supp. 1486 (E.D. Tenn. 1989).

articles allegedly portraying the school in a negative light and her advising students of their right to refuse to retract the articles were protected free expression.[48] A special educator, who received a written reprimand and whose contract was unsuccessfully sought to be nonrenewed after speaking out at a meeting and writing an article in her own name and not as a representative of her school district, stated a section 1983 cause of action for suppression of her right to speak, even though plaintiff suffered no actual damages.[49] A teacher, who had published an article in a local newspaper criticizing a lack of school board concern for teacher turnover and who was subsequently reprimanded by the board for insubordination, was entitled to a jury trial in her section 1983 suit as to whether the reprimand was an attempt to silence her free speech rights.[50] A school district maintenance employee, who had quietly walked out of a meeting called by the superintendent regarding a referendum on new taxes and was subsequently discharged, was entitled to proceed with a section 1983 action for violating his constitutional right of free expression. Individual school board members who had voted to terminate the employee were entitled only to qualified immunity instead of absolute immunity.[51] A tenured English teacher fired from his position as advisor to the school's newspaper survived the school board's motion for summary judgment involving his section 1983 violation of speech action because material facts existed as to whether a disclaimer on the paper's masthead was in effect at the time of publication and because educators can exert less control over a school newspaper which is extracurricular and not tied to classroom instruction.[52]

On the other hand, a tenured high school teacher's first amendment right of academic freedom did not extend to the choice of a classroom management system called "Learnball," which the school district had prohibited as not benefiting the students.[53] A nonrenewed school nurse, who had spoken out over a period of several months about the school district policy permitting school nurses to administer prescription drugs with parental, but not necessarily physician, permission, lost her free speech protection because her false statements about indiscriminate administration of drugs and her continual complaints at monthly nurses' meetings rendering them unproductive had a general disruptive effect on the nursing program.[54] A probationary teacher's $50,000 damages award for violation of his free speech rights was set aside because his use of his own supplemental history reading list rather than the district's list was not a

48. Watson v. Eagle County School Dist., 797 P.2d 768 (Colo. Ct. App. 1990).
49. Berlin v. Superintendent of Pub. Instruction, 448 N.W.2d 764 (Mich. Ct. App. 1989).
50. Ridgeway v. Kiowa School Dist. C-2, 794 P.2d 1020 (Colo. Ct. App. 1989).
51. Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499 (11th Cir. 1990).
52. Romano v. Harrington, 725 F. Supp. 687 (E.D.N.Y. 1989).
53. Bradley v. Pittsburgh Board of Educ., 910 F.2d 1172 (3d Cir. 1990).
54. Johnsen v. Independent School Dist. No. 3 of Tulsa County, Okla., 891 F.2d 1485 (10th Cir. 1989).

matter of public concern.[55] At the state level, the Oregon constitutional provision prohibiting restraint of free expression did not imply a right to damages for a constitutional violation, contrary to the first amendment of the Federal Constitution, or a violation for which damages can be awarded under section 1983.[56]

Association

Successful plaintiffs in this area won with complaints about involvement with unions. A tenured teacher was held to have been dismissed in violation of a constitutional right of association for engaging in a unionization campaign, even though the school board alleged the reason was economic necessity because the board had never before discharged a tenured teacher, the teacher was senior to other tenured teachers not dismissed, the dismissal came shortly after unionization efforts, and there was no evidence that economic necessity existed.[57] Two teachers, husband and wife, who had been subject to harassment after filing grievances with the AFT and NEA, were entitled to a trial because the unconstitutionality of retaliating against an employee for participating in a union is clearly established. In this case the court made it clear that retaliation is not limited to termination, suspension, or transfer.[58] In a different kind of case, a school district sought reimbursement from its liability insurer for a $268,373.51 settlement made to ten present and former teachers who had alleged in a section 1983 suit various acts of retaliation for teachers joining a particular education association. The school district was entitled to reimbursement because the policy had no exclusion for intentional wrong doing and the exclusion for claims involving contract obligations did not apply since this section 1983 action was for breach of first amendment issues.[59]

In only one case was a school district successful in a freedom of association action. An assistant principal assigned teaching duties after she had filed a grievance, resulting in an upward improvement in her evaluation from "excellent" to "superior," lost in her claim that the assignment violated her freedom of association because freedom of association claims in relation to speech actions must meet the same public concern test as public employee free speech; plaintiff's filing of a grievance was not a matter of public concern.[60]

---

55. Kirkland v. Northside Indep. School Dist., 890 F.2d 794 (5th Cir. 1989).
56. Hunter v. City of Eugene, 787 P.2d 881 (Or. 1990).
57. Temple v. Board of Educ. of School Dist. No. 94, 548 N.E.2d 640 (Ill. App. Ct. 1989).
58. Morfin v. Albuquerque Pub. Schools, 906 F.2d 1434 (10th Cir. 1990).
59. New Madrid County Reorganized School Dist. No. 1 v. Continental Casualty Co., 904 F.2d 1236 (8th Cir. 1990).
60. Griffin v. Thomas, 724 F. Supp. 587 (N.D. Ill. 1989).

Religion

Only one case was reported in this area. In a case involving demotion of a school principal for quoting scriptures and referring to God in most written memos, a court ordered this case remanded to determine whether the school board had shown by convincing evidence that the principal would have been demoted even in the absence of what the school board admitted was protected conduct. The court noted that the principal had not been charged with conduct outside the protection of free exercise of religion which "posed some substantial threat to public safety, peace or order."[61] Indeed, the school board admitted that the "absolute most that [was] revealed [was] that some of [the principal's] staff were personally offended by certain of her religious utterings."[62]

Privacy

School employees lost two of three cases in this area. A continuing contract teacher dismissed on the basis of incompetency, based in part on videotapes of her teaching performance, did not have any privacy right violated because "the activity of teaching in a public classroom does not fall within the expected zone of privacy . . . . There is no invasion of the right of privacy when one's movements are exposed to public views generally."[63] The constitutional rights of a teacher, who had taken an extended leave of absence for medical reasons, were not violated where the school board refused to reinstate the teacher until she had brought all medical records to the school district's physician so he could properly evaluate her status to return to teaching.[64]

A school district policy of requiring school bus drivers to take a drug-screening urinalysis as part of an annual physical without any particularized suspicion of drug use did not violate fourth amendment rights. However, a positive drug test result by itself did not constitute "misconduct" so as to disqualify discharged bus drivers from unemployment compensation.[65]

Substantive Due Process

Violations of substantive due process tend to occur when state actions are arbitrary, capricious, or unfair in substance, rather than lacking in

---

61. Hooks v. Smith, 781 S.W.2d 522, 524 (Ky. Ct. App. 1989) (citing to Sherbert v. Verner, 374 U.S. 398 (1963)).
62. *Id.*
63. Roberts v. Houston Indep. School Dist., 788 S.W.2d 107, 111 (Tex. Ct. App. 1990).
64. Strong v. Board of Educ. of Uniondale Union Free School Dist., 902 F.2d 208 (2d Cir. 1990).
65. Independent School Dist. No. 1 of Tulsa County v. Logan, 789 P.2d 636 (Okla. Ct. App. 1989).

procedural correctness, so as to deprive a school employee of a property right. The Tenth Circuit Court of Appeals found a jury question existed as to whether a school board could be liable for upholding discharge of an employee who had publicly opposed a bond issue. In determining school board liability under section 1983 the court declared that "the deliberate indifference standard is the appropriate one to use . . . to determine whether the requisite direct causal link exists between the alleged constitutional deprivation and the board's decision, as final policy maker, to fire [plaintiff]."[66] On the other hand, a teacher who had allegedly been dragged from her classroom by the principal failed to state a section 1983 cause of action under substantive due process analysis because of the absence of deadly force by the principal. In addition, the plaintiff failed to state that the principal's action was the result of deliberate indifference of the rights of others. Where, as in this case, state tort claims predominate, a federal district court should decline jurisdiction.[67]

PROCEDURAL DUE PROCESS

Procedural due process focuses on the fairness of treatment to school employees, rather than fairness of the underlying rules which led to the judicial conflict. In a case of first impression in Minnesota, the state court of appeals determined that a school board is not required by due process to accept findings of an independent hearing officer hired by the board in termination proceedings where the issue was employee immorality; due process requires only that the school board specify its reasons for rejecting the hearing officer's findings. In addition, there is no due process requirement that the person who builds the record be the ultimate decision maker.[68] In a slightly different vein, a teacher who had filed a section 1983 suit alleging termination without notice or hearing and who was later reinstated was not entitled to a preliminary injunction against the school board preventing its terminating her without due process because there was no evidence the board intended to take similar action in the future.[69]

Liberty and Property Interests

Occasionally, a case implicates both liberty and property interests. In a teacher's section 1983 action for constructive discharge without a

---

66. Ware v. Unified School Dist. No. 492, 902 F.2d 815, 817 (10th Cir. 1990).
67. Coleman v. Wirtz, 745 F. Supp. 434 (N.D. Ohio 1990).
68. *In re* Etienne, 460 N.W.2d 109 (Minn. Ct. App. 1990).
69. Haussmann v. Chicago Bd. of Educ., 737 F. Supp. 56 (N.D. Ill. 1990).

hearing for his exercise of first amendment rights, a court would be abusing its discretion if it stayed plaintiff's general discovery designed to determine whether any liberty or property interests were violated.[70] In Florida, an elementary school principal who had served under a series of three-year contracts and who had then been offered a one-year contract as an assistant elementary school principal at his same salary had experienced a "demotional transfer" under state statute and was entitled to a due process hearing regarding his property and liberty interests.[71]

Property interests must find their basis in some contractual or statutory entitlement. A teacher had a procedural due process claim arising out of his alleged suspension without pay and without hearing or opportunity to be heard following his return from sick leave when the school board refused to allow him to work during pendency of his termination proceedings. The fact that the teacher ultimately received full sabbatical pay for that period following union-initiated grievance arbitration of his request for a sabbatical did not mean that there was no potential violation of due process, but only that damages ultimately awarded might be reduced.[72] Similarly, a bus driver had a property interest in his employment and, under *Cleveland Board of Education v. Loudermill*,[73] his suspension without pay, as opposed to termination, entitled him to the same *Loudermill* pretermination rights to notice and hearing. Even though his suspension was upheld at a subsequent hearing, the bus driver was entitled under *Loudermill* to wages between his suspension and the hearing.[74] A post-termination hearing required to protect a property right must provide a written notice of specific grounds for termination, an opportunity to confront and cross-examine witnesses, an opportunity to be represented by counsel, a fair-minded and impartial decision maker, and a written statement by the fact-finder as to evidence relied upon and reasons for determinations that were made.[75] A nonteaching employee whose discharge did not follow the progressive discipline procedures in the employee handbook stated a cause of action for deprivation of a property interest. "[U]nder Colorado law an employee personnel handbook may grant to an employee a property interest in continued employment which entitles the employee to the protections of the procedural due process guarantees of the United States Constitution."[76] However, an employee cannot claim a property interest in a personnel manual provision pertaining to termination, which might reasonably have

70. Hovermale v. School Bd. of Hillsborough County, Fla., 128 F.R.D. 287 (M.D. Fla. 1989).
71. French v. School Bd. of Polk County, 568 So. 2d 497 (Fla. Dist. Ct. App. 1990).
72. Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064 (3d Cir. 1990).
73. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).
74. Ayio v. Parish of W. Baton Rouge School Bd., 569 So. 2d 234 (La. Ct. App. 1990).
75. Deuel v. Arizona State School for the Deaf and Blind, 799 P.2d 865 (Ariz. Ct. App. 1990).
76. Adams County School Dist. No. 50 v. Dickey, 791 P.2d 688, 694 (Colo. 1990).

contained a promise conferring an offer of employment, where the employee had not received a copy of the provision until after termination.[77]

In other cases courts have found no property interests. An Illinois state law which permits psychiatric examinations as part of the teacher remediation process meant that a teacher had no constitutionally protected right to be free from such examinations in a remediation plan.[78] A tenured high school teacher had no property interest in continuing his teaching and coaching at the same high school where, under the terms of his employment contract, teaching assignments were at the total discretion of the school district and coaching assignments were subject to cancellation at any time.[79] A superintendent lost his expectation of continual employment when he submitted his letter of resignation, even though the letter was conditionally accepted by the school board and the board did not vote to terminate him until one year later. A factor that may have weighed in this result is that subsequent to the board termination, the former superintendent was convicted of wrongfully converting school district property and embezzling district funds.[80]

Liberty interests involve matters of reputation and possible name-clearing hearings. Reasons given in a letter to a dismissed elementary principal for incompetence, inability to relate well with others, and lack of tact did not implicate liberty interests, even if they involved charges of moral turpitude or dishonesty, because the school district did not disclose the reasons to the public.[81]

Aspects of Notice

Issues involving employee hearings arose under both state statutes and the Federal Constitution. A teacher's nonrenewal would not be overturned even though the statutory notice requirement for nonrenewal had not been followed because the teacher had been participating in six meetings over two years documenting her continued deficiencies and the ultimate decision for nonrenewal.[82] An attorney, who had been employed by a school district to negotiate with the representative of a nonrenewed teacher, had apparent authority under state statute to waive statutory formal notice by the teacher for a board hearing. As a result, the school board was bound by its attorney's waiver.[83] In a school district's motion for definite state-

---

77. Hohmeier v. Leyden Community High School Dist. 212, 748 F. Supp. 657 (N.D. Ill. 1990).
78. Sweeney v. Board of Educ. of Mundelein Consol. High School Dist. 120, Lake County Ill., 746 F. Supp. 758 (N.D. Ill. 1990).
79. Thomas v. Smith, 897 F.2d 154 (5th Cir. 1989).
80. Unified School Dist. No. 457, Finney County, Kan. v. Phifer, 729 F. Supp. 1298 (D. Kan. 1990).
81. Hayes v. Phoenix-Talent School Dist., 893 F.2d 235 (9th Cir. 1990).
82. Krischer v. School Bd. of Dade County, 555 So. 2d 436 (Fla. Dist. Ct. App. 1990).
83. Brennan v. School Dist. 21 of Holt County, 458 N.W.2d 227 (Neb. 1990).

ment of a nonrenewed teacher's constitutional claims, a federal court held that the teacher's allegation that she was directed to award a student a "C" in a course against her professional judgment "fairly appraise[d] the defendant [school board] of the claims asserted as required by federal pleading standards."[84]

Aspects of Hearing

Problems involving hearings arose at both constitutional and statutory levels. In the absence of a state statute which requires sworn testimony of witnesses at a hearing to remove a tenured teacher for neglect of duty, the teacher has no such right since sworn testimony is not "an essential element of the teacher's due process rights" to protect her property right in continued employment.[85] A dismissed school bus driver whose dismissal hearing was not held within forty-five days of dismissal as required by state statute had not been deprived of due process where she had been informed of charges against her, had been afforded a full hearing, was represented by counsel, was able to confront witnesses against her, and could not show prejudice to her as a result of the delayed hearing.[86] A tenured teacher accused of misconduct had not been denied procedural due process where the attorney appointed to serve as hearing officer for a pretermination hearing was a member of the same law firm as the attorney representing the superintendent in the disciplinary proceedings. This case must be considered in the context of the somewhat limiting factors that the school board made the discharge decision and the hearing officer expressed no opinion to the board regarding the evidence, and also that this was not a full, post-termination adjudicatory proceeding.[87]

Employees prevailed in two cases each involving bias and a resignation. The North Carolina Supreme Court applied its "one member bias" rule in upholding a section 1983, $78,000 judgment on behalf of a teacher dismissed because of the bias of one member of the school board at the hearing. Section 1983 permits recovery for mental and emotional distress caused by the due process violation itself, even if the teacher is later furnished an unbiased hearing. The fact that only one member of the board may have been biased does not offset a unanimous board decision to dismiss a teacher because "[o]ne biased member can skew the entire process by what he or she does, or does not do, during the hearing and deliberations."[88] Finally, a school employee in a weakened condition who signed a prepared resignation form was entitled to section 1983 damages for failure of the

84. Motagriff v. Adams County School Dist., 128 F.R.D. 117 (D. Colo. 1989).
85. Gaulden v. Lincoln Parish School Bd., 554 So. 2d 152, 155 (La. Ct. App. 1989).
86. McLaughlin v. Jefferson Parish School Bd., 560 So. 2d 585 (La. Ct. App. 1990).
87. Plymouth-Canton Schools v. State Tenure Comm'n, 457 N.W.2d 656 (Mich. 1990).
88. Crump v. Board of Educ. of Hickory Admin. School Unit, 392 S.E.2d 579 (N.C. 1990).

school district to hold a pre-termination hearing because the post-termination hearing, which he had received, "is constitutionally adequate in instances of random and unauthorized acts by a governmental employee, and does not apply if the deprivation arises by virtue of established or authorized procedure."[89]

DISMISSAL, NONRENEWAL, DEMOTION, and DISCIPLINE

State statutes, local board policies, and local collective bargaining contracts outline the procedures that must be followed and the charges that may be levied when employees are subjected to many types of adverse employment actions. A wide variety of substantive and procedural issues pertaining to teacher discipline and the broad range of effects of teacher removal are reflected in this section.

A state continuing contract law, which provided that school boards seeking to remove tenured teachers must state in detail the reasons for the proposed cancellation of a contract, was not complied with by general charges of incompetency, neglect of duty, and other good and just causes.[90] A sixty-one year old coordinator of risk and insurance programs, who was discharged at the insistence of a school board member because the coordinator would not assign legal cases to firms chosen by the school board member and would not provide employee benefit reports by a company referred by the board member, recovered damages for wrongful discharge of $348,596 for lost compensation, $125,000 for emotional distress, and $25,000 in punitive damages.[91] A teacher ordered reinstated was required under the general contract principle of damages to offset from an award of back pay any earnings received from teaching.[92]

Insubordination

The employees won two cases and lost one case in this section. According to the Kansas Appeals Court a single act of insubordination can support a dismissal. In this case a tenured teacher had called in sick after his request for a day off to be interviewed for another job had been denied.[93] A veteran teacher with a good overall record, who had acted

89. Price v. Boulder Valley School Dist., 782 P.2d 821, 825 (Colo. Ct. App. 1989).
90. Gardner v. Alabama State Tenure Comm'n, 553 So. 2d 606 (Ala. Civ. App. 1989).
91. Mouchette v. Board of Educ., Oakland Unified School Dist., 266 Cal. Rptr. 1 (Ct. App. 1990).
92. Gross v. Board of Educ. of Elmsford Union Free School Dist., 552 N.Y.S.2d 334 (App. Div. 1990).
93. Gaylord v. Board of Educ., Unified School Dist. No. 218, Morton County, 794 P.2d 307 (Kan. Ct. App. 1990).

reflexively in striking a student in response to a disrespectful gesture, could not be dismissed from her tenured teaching position for insubordination even though the teacher's act violated board of education policy.[94] A teacher who had been discharged by a school board for continuously violating directives won a victory of sorts when the Michigan Supreme Court held that his discharge could be reduced by the State Tenure Commission to a suspension.[95]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

All but three cases in this section were decided for the school district. One of the three exceptions involved a high school teacher charged with five acts of misconduct in four years prior to the year of his discharge. The court held that he could not be discharged on grounds his behavior indicated a "pattern of conduct" that was not indicative of good judgment or good teaching behavior where the superintendent's notice of nonrenewal did not contain a reason indicating a pattern of misconduct.[96] In the second case, a teacher suspended for unprofessional conduct after using physical force toward a student, and who was acknowledged prior to his hearing to have been remediated, had been unlawfully suspended under state law.[97] In the third case, a school board's dismissal of a tenured teacher on the ground of willful neglect of duty because the teacher had failed to take a loaded gun from a student in his class or separate him from the other students, was reversed since the school district had no established policy regarding this kind of problem and the teacher was left to rely on his own judgment. In this case, no student in the class had been threatened with the gun.[98]

Failure of a tenured teacher to follow the school's adopted mathematics curriculum, poor rapport with students, insufficient communication with parents, and a lack of student progress supported the school district decision to terminate the teacher for inefficiency in teaching.[99] A tenured counselor's termination was upheld where he repeatedly was negligent in preparing referral packets on students, reporting to work on time, having numerous unexplained work absences, and failing to submit acceptable weekly and monthly plan books and yearly plans as requested of counselors.[100] An eleven-year teacher received adequate notice of a charge

---

94. *Ex parte* Alabama State Tenure Comm'n, 555 So. 2d 1071 (Ala. 1989).
95. Lakeshore Pub. School Bd. of Educ. v. Grindstaff, 461 N.W.2d 651 (Mich. 1990).
96. Allen v. Texarkana Pub. Schools, 794 S.W.2d 138 (Ark. 1990).
97. Crowl v. Commission of Professional Competence of the Governing Bd. of the San Juan Unified School Dist., 275 Cal. Rptr. 86 (Ct. App. 1990).
98. Board of Educ. of County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990).
99. *In re* Termination of James E. Johnson, 451 N.W.2d 343 (Minn. Ct. App. 1990).
100. Alabama State Tenure Comm'n v. Birmingham Bd. of Educ., 564 So. 2d 980 (Ala. Ct. Civ. App. 1990).

of having a student in the work area of the welding shop without proper supervision; and that charge supported the school board's decision to nonrenew the teacher's contract, especially in light of conditions regarding correction of past safety violations which had been placed in plaintiff's current contract.[101] Dismissal of an elementary teacher after pleading *nolo contendere* to one count of sexual assault stemming from sexual intercourse with a fifteen-year-old neighbor boy was upheld on the basis of unfitness to teach, reflecting "her poor judgment, her lack of concern for the emotional welfare of a public school student, and her impaired ability to deal with other sexually exploited students due to public awareness of her course of conduct."[102] Evidence that a transportation supervisor repeatedly touched female employees on their buttocks and kissed them without their consent justified dismissal even though the hearing officer had recommended only a three-month suspension.[103] A tenured teacher's discharge for touching the chests, shoulders, legs, and buttocks of elementary female students was upheld as irremediable unprofessional physical conduct unbecoming a teacher under state statute.[104] A novel case arose in Alabama as to whether a tenured teacher, who had been elected to a four-year term as county superintendent of schools, could be denied reinstatement as a tenured teacher at the end of four years on the theory that she had abandoned her contract which constituted "neglect of duty" as a statutory basis for cancellation of a teacher's contract. The Alabama Supreme Court decided that the county superintendent was a "supervisor" under the state's continuing contract statute and therefore promotion (or election) to such a position could not jeopardize a teacher's tenure status.[105]

Immorality

Employees lost all cases under this section. A permanent teacher whose responsibilities included instruction and participation in the school district's anti-drug program could be dismissed for "immorality" and "neglect of duty" where her husband, with her knowledge but not her cooperation, was using their jointly owned home to grow and sell marijuana.[106] The actions of a high school teacher, who carried on a series of discussions with one of his students as to whether they should engage in sexual intercourse, constituted sexual exploitation of a student warranting plaintiff's

---

101. Hilliard v. Orangeburg County School Dist. Number Three, 386 S.E.2d 628 (S.C. Ct. App. 1989).
102. Elvin v. City of Waterville, 573 A.2d 381, 383 (Me. 1990).
103. Comeau v. Board of Educ. of Ballston Spa Cent. School Dist., 554 N.Y.S.2d 359 (App. Div. 1990).
104. Board of Educ. of City of Chicago v. Box, 547 N.E.2d 627 (Ill. App. Ct. 1989).
105. *Ex parte* Weaver, 559 So. 2d 178 (Ala. 1989).
106. Jefferson County School Dist. No. 509-J v. Fair Dismissal Appeals Bd., 793 P.2d 888 (Or. Ct. App. 1990).

discharge on the basis of immoral conduct.[107] A finding that a teacher's love letters and profession of love to students constituted "immorality" under state statute also constituted "just cause" for dismissal under the collective bargaining agreement.[108] In Illinois, transportation of two female students to a teacher's home where they became intoxicated constituted irremediable immoral behavior warranting discharge.[109]

Incompetency

Although somewhat difficult to prove, charges of incompetency were upheld in all four reported cases. Contract termination of a permanent teacher one year short of thirty years teaching necessary to draw full pension benefits was upheld where a teacher admitted she had life-long difficulties with spelling and grammar and received complaints from two prior principals about her incompetency. Within the documents presented by the school teacher she misspelled the names of twenty-six of her students as well as her own name.[110] A teacher certified to teach science, biology, chemistry and guidance counseling, and who was later employed as a school psychologist, could be removed as incompetent as determined by the standard of school psychologists trained in the field, even though the teacher had received no formal training or education as a school psychologist.[111] A tenured teacher's conviction for failing to file income tax returns and his post-indictment conduct supported the teacher's dismissal under state statute for "incompetency, immorality, other sufficient cause, and [the] best interests of the school."[112] In termination proceedings for incompetency, failure of the county board of education to include on a bus driver's annual evaluation form the specific accidents for which he was terminated was not a fatal deviation from statutory requirements since the board had substantially complied with the statute.[113]

Compliance with School Board Policies and State Statutes

Courts have tended to give great latitude to school boards in complying with a variety of statutory requirements. In Pennsylvania, a new compensation plan whereby administrators would be paid higher salaries to work twelve months rather than ten months did not constitute a demotion

---

107. Sauter v. Mount Vernon School Dist. No. 320, Skagit County, 791 P.2d 549 (Wash. Ct. App. 1990).
108. Manheim Cent. Educ. Ass'n v. Manheim Cent. School Dist., 572 A.2d 31 (Pa. Commw. Ct. 1990).
109. Massie v. East St. Louis School Dist. No. 189, 561 N.E.2d 236 (Ill. App. Ct. 1990).
110. Beck v. James, 793 S.W.2d 416 (Mo. Ct. App. 1990).
111. Harris v. Bailey, 798 P.2d 96 (Mont. 1990).
112. McCullough v. Illinois State Bd. of Educ., 562 N.E.2d 1233, 1236 (Ill. App. Ct. 1990).
113. Hare v. Randolph County Bd. of Educ., 396 S.E.2d 203 (W. Va. 1990).

where the pay per day decreased because "salary" under state statute meant an annual salary.[114] Under Oregon statutory law, a nontenured principal could be demoted and reassigned to a teaching position for ineffectiveness without the need for formal evaluation procedures. The transfer was deemed a discretionary function and the school district need only find that such transfer was in the district's best interest.[115] A school board had authority to suspend a teacher for two days without pay and deduct $146 from his pay check where the board had assessed $1.00 per book charge against the teacher for cutting out the glossaries of 146 science books.[116] Under Montana statutory law, two and one-half day disciplinary suspensions were not "dismissals" within the meaning of the statute governing dismissal of teachers under contract, and thus procedures under that statute were not available to the teacher.[117] A school board had the authority to reduce a noncertified position of personnel director of the merit system to half time because the director was an employee of the board and the reduction occurred while the position was vacant.[118] A RIFed custodian who was interviewed for a vacant custodian position but not hired was not prejudiced because the school board had failed to post notice of a classified vacancy as required by the school district's intra-district transfer policy. Failure of the school board to advertise the position "was neither detrimental nor unjust to the [plaintiff]" where he "interviewed for the position and was evaluated according to the same standards as the other applicant."[119] A school principal serving under a series of one-year employment agreements had no statutory rights of notice where his demotion to a teaching position was not for incompetency and he could not rely on a provision in the superintendent's contract that the superintendent had "primary responsibility for execution of board policy" to challenge his demotion.[120] Failure of a school district to follow its evaluation procedure did not prohibit the district from nonrenewing the contract of a probationary teacher because the teacher could have been dismissed even if she had a favorable evaluation.[121]

In an interesting case involving both contract and statutory interpretation, the Nebraska Supreme Court determined that a local school board had furnished a nonrenewed superintendent with appropriate notice. School board notice of nonrenewal more than one year in advance was necessary to prevent the contract from automatically extending one more year

---

114. Ahern v. Chester-Upland School Dist., 582 A.2d 741 (Pa. Commw. Ct. 1990).
115. Odegaard v. Everett School Dist., 797 P.2d 1152 (Wash. 1990).
116. Board of Trustees of Hamilton Heights School Corp. v. Landry, 560 N.E.2d 102 (Ind. Ct. App. 1990).
117. Debar v. Trustees, Yellowstone County Elementary School Dist. No. 2, 796 P.2d 1081 (Mont. 1990).
118. Personnel Comm'n of Lynwood Unified School Dist. v. Board of Educ. of Lynwood Unified School Dist., 266 Cal. Rptr. 46 (Ct. App. 1990).
119. Ware v. Converse County School Dist. No. 2, 789 P.2d 872, 875 (Wyo. 1990).
120. McFall v. Madera Unified School Dist., 272 Cal. Rptr. 345 (Ct. App. 1990).
121. Leonard v. Converse County School Dist. No. 2, 788 P.2d 1119 (Wyo. 1990).

according to the terms of the contract. But since a school superintendent was considered under state statute to be a probationary certificated employee, notice approximately four months prior to the end of the contract year with opportunity for an informal hearing was all the statutory rights to which the nonrenewed superintendent was entitled.[122]

A number of cases addressed a variety of issues involving length of employment. Abolition of a supervisory category and refusal to promote supervisors to a higher category because of severe financial difficulties did not amount to a demotion under Louisiana statute where there was no reduction in salary and rank.[123] Nonrenewing a superintendent's contract for cause coupled with an offer of a public hearing did not constitute a discharge in North Dakota where the superintendent continued to function as superintendent through the remainder of the school year and received his full salary.[124] A school board's rule permitting a superintendent to suspend an employee without pay for up to three days was not an unlawful delegation of authority under Florida statutes. A school board can delegate authority "which is not expressly prohibited" by state statute.[125] A Louisiana statute, which provided only that the term of the superintendent shall not exceed four years, was interpreted to mean that a superintendent's four-year contract renewed in May expired in December simultaneously with the end of the term of office of the school board because the superintendent as an employee of the board "should represent the values, policies, and attitudes of the duly elected school board in order to effectively implement the programs of that board."[126] A tenured teacher who had filed for retirement with the New York Teacher's Retirement System had also effectively resigned from his position as occupational guidance counselor and did not have to be reinstated by the school district.[127]

Discussion among school board members in closed session regarding dismissal of a nontenured teacher prior to the termination vote in open session did not disqualify the board members as decision makers under state law as long as the roll call vote took place in the open session.[128] A nontenured teacher hired for a one-year contract expiring on June 30, who was furnished notice of nonrenewal prior to the April 1 cut-off date, could not argue that failure of the school district to hire her in August for another vacant position was in retaliation for an ethics discussion in class, because at the time the school board made its employment decision in August, the

---

122. Matrisciano v. Board of Educ. of Brady School Dist. No. 6, Lincoln County, 459 N.W.2d 230 (Neb. 1990).
123. Beason v. Rapides Parish School Bd., 558 So. 2d 281 (La. Ct. App. 1990).
124. Sailer v. Rhame Pub. School Dist. No. 17, 455 N.W.2d 588 (N.D. 1990).
125. School Bd. of Collier County v. Florida Teaching Profession Nat'l Educ. Ass'n, 559 So. 2d 1197, 1198 (Fla. Ct. App. 1990).
126. Hayden v. Richland Parish School Bd., 554 So. 2d 164, 169 (La. Ct. App. 1989).
127. Cannon v. Ulster County Bd. of Coop. Educ'al Servs., 548 N.Y.S.2d 107 (App. Div. 1989).
128. Verticchio v. Divernon Community Unit School Dist. No. 13, 555 N.E.2d 738 (Ill. App. Ct. 1990).

the teacher was no longer an employee under state law.[129] A school district grounds-keeper who had been terminated was not entitled to notice or hearing prior to termination under a state statute requiring notice and hearing for employees who had served 195 days within one school year where the employee's term included parts of two successive academic years.[130]

However, discretion of school boards is limited and employees prevailed in a significant number of cases. While fact situations of all cases are varied, a common thread is the relationship between contract provisions and statutory requirements or limitations. Alabama's Fair Dismissal Act provision that notification, reasons for termination, and a hearing applied to the three years of a nontenured teacher's probationary status also applied to nonteacher employees employed on a three-month contract.[131] Nonprofessional educational employees working pursuant to three-month contracts were subject to the state's Fair Dismissal Act and could not have their contracts terminated and pay stopped without the school district meeting the Act's requirement of employees' right to draw salaries until charges against them had been proved.[132] A substitute bus driver who failed to take the required physical examination because of his mother's illness and his own hospitalization for hepatitis did not display willful misconduct so as to disqualify the terminated employee from unemployment compensation.[133] A collective bargaining agreement which failed to allow for final and binding arbitration in all instances violated Ohio state statute and therefore bus drivers who had been terminated pursuant to the inadequate agreement were entitled to back pay.[134] Under Illinois statutes, where remediation of teaching defects is required except in certain statutory dismissal offenses, a teacher who had taught agriculture classes for nine years without the required teaching requirements was entitled to remediation. The school district's argument that it might lose state aid for permitting an unqualified teacher to teach was too speculative and did not meet the test of damage to students, faculty, or school to make the teacher's dismissal irremediable.[135] An existing contract teacher could not be denied her due process rights under the state's Term Contract Nonrenewal Act when a school district sought to apply its new probationary policy to that teacher.[136] The head basketball coaching responsibilities of a tenured teacher were included within the definition of "teacher" under the state's

---

129. Sheridan v. Board of Educ. of the Town of Fairfield, 565 A.2d 882 (Conn. Ct. App. 1989).
130. California School Employees Ass'n, Feather River Chapter No. 342 v. Oroville Union High School Dist., 269 Cal. Rptr. 90 (Ct. App. 1990).
131. *Ex parte* Clayton, 552 So. 2d 152 (Ala. 1989).
132. Clayton v. Board of School Comm'rs of Mobile County, 552 So. 2d 145 (Ala. Civ. App. 1989).
133. Arkle v. Independent School Dist. Number One of Tulsa County, 784 P.2d 91 (Okla. Ct. App. 1989).
134. Sutton v. Cleveland Bd. of Educ., 726 F. Supp. 657 (N.D. Ohio 1989).
135. Morris v. Illinois State Bd. of Educ., 555 N.E.2d 725 (Ill. App. Ct. 1990).
136. Central Educ. Agency v. George West Indep. School Dist., 783 S.W.2d 200 (Tex. 1989).

continuing contract law entitling him to back pay and reinstatement when the school board removed him without providing notice of nonrenewal required under state law.[137] Under Alabama's Fair Dismissal Act, a school board had to pay a terminated employee until the employee's requested review panel had heard and determined charges against him.[138] A nontenured teacher who had signed a special one-year teaching contract was nonetheless entitled under the school district's Master Agreement to a statement of specific reasons regarding nonrenewal of her contract.[139]

A number of cases dealt with unique dismissal situations. The state commissioner of education in New York could not increase a hearing panel's recommendation of a teacher penalty of a board reprimand for unbecoming conduct to a one-semester suspension without pay where the commissioner violated administrative precedent by basing his decision on prior warnings to the teacher of misconduct rather than prior disciplinary convictions.[140] A school board, which had accepted the findings of an administrative law judge that the evidentiary record did not support an ultimate fact finding requiring dismissal of a tenured teacher for alleged incompetency, could not under the Colorado Teacher Tenure Act then use the same evidentiary findings to impose a one-year probation on the teacher. Having accepted the law judge's findings regarding dismissal, the school board could not impose probation without again going through the entire administrative review process.[141] A tenured custodian suspended for sale of marijuana was entitled under New Jersey statute to pay from date of suspension until he was indicted.[142] A suspended teacher, ordered reinstated "with all prerequisites and benefits," was entitled to whatever rights she would have received as a teacher on leave of absence, including salary and worker's compensation awards.[143] This case was before the Tennessee Supreme Court for the second time in two years[144] and involved what the court described as "reprehensible treatment of the teacher by the school district."[145]

Cases also involved issues of unemployment compensation, fairness of punishment, and fairness of hearing. A day-care worker discharged after striking a student in violation of her employer's rule against physical punishment was entitled to unemployment compensation because her reflex action in striking the student to prevent being struck a second time did

---

137. Reid v. Huron Bd. of Educ., 449 N.W.2d 240 (S.D. 1989).
138. Crenshaw v. Mobile County Bd. of School Comm'rs, 560 So. 2d 1059 (Ala. Civ. App. 1989).
139. Birgenheier v. Trustees, Yellowstone County Dist. No. 2, 791 P.2d 1388 (Mont. 1990).
140. Engel v. Sobel, 556 N.Y.S.2d 179 (App. Div. 1990).
141. Forbes v. Poudre School Dist. R-1, 791 P.2d 675 (Colo. 1990).
142. Slater v. Board of Educ. of Ramapo-Indian Hills Regional High School Dist., 568 A.2d 109 (N.J. Super. Ct. App. Div. 1989).
143. McGhee v. Miller, 785 S.W.2d 817, 819 (Tenn. 1990).
144. *See* McGhee v. Miller, 753 S.W.2d 354 (Tenn. 1988). *See* Yearbook of Education Law 1989 at 18.
145. McGhee v. Miller, 785 S.W.2d 817, 819 (Tenn. 1990).

not constitute statutory misconduct.[146] An employee's contract year can be changed through practice to coincide with the employer's fiscal year. An employee hired in September had the annual renewal date of her contract altered through practice to July 1 when the education council awarded her a raise; the effect of the raise was to create a contract for a one-year term entitling the employee to ninety days notice prior to termination.[147] A tenured teacher who had been charged with misconduct and who was entitled to salary payments after he requested adjournment of his hearing was entitled to salary payments for the period between the time the hearing was ordered reconvened and the time of his retirement absent any indication that he was responsible for the delay in reconvening the hearing.[148] A twelve month suspension without pay, the most severe sanction that could be imposed, for three acts of misconduct by a driver with a twenty-year excellent driving record was so disproportionate as to be shocking to one's sense of fairness.[149] A probationary special education teacher, who alleged that the participation of a biased board member with a child in her special education class subverted the purpose of a statutorily-provided "private conference" between the board and the teacher prior to nonrenewal, was entitled to trial as to whether the board member's participation denied the teacher a fair hearing. The school district's immunity from damages did not apply to injunctive relief in the teacher's claim for reinstatement.[150]

One case did not fit clearly in the categories above and reflects the relationship among teachers, school boards, and the press. A newspaper was entitled under Michigan's Freedom of Information Act to a copy of tenure charges of sexual misconduct against and the settlement agreement between the teacher and school district even though the teacher's identity could not be revealed under the Act.[151]

REDUCTION-IN-FORCE and INVOLUNTARY LEAVES of ABSENCE

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate a reduction-in-force (RIF). The sufficiency of reasons for RIF, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state tenure statutes, local board policies, and collective bargaining agreements. State reduc-

146. Smith v. Kinder Care Learning Centers, Inc., 389 S.E.2d 30 (N.C. 1990).
147. Burge v. Western Pa. Higher Educ. Council, Inc., 570 A.2d 536 (Super. Ct. 1990).
148. Derle v. North Bellmore Union Free School Dist. 551 N.Y.S.2d 49 (App. Div. 1990).
149. Borkhuis v. Quinn, 551 N.Y.S.2d 82 (App. Div. 1990).
150. Harkness v. Palmyra-Eagle School Dist., 460 N.W.2d 769 (Wis. Ct. App. 1990).
151. Booth Newspapers, Inc. v. Kalamazoo School Dist., 450 N.W.2d 286 (Mich. Ct. App. 1989).

tions will normally be upheld if supported by a rational basis. Thus, a state early retirement statutory arrangement for state employees which had as its primary intent the facilitation of savings in the state revenues by lowering the number of employees on the state payroll stated a rational basis and was therefore not violative of the equal protection clause when it excluded state superintendents since they were on the payroll of local school districts.[152]

Necessity for Reduction-in-force

Two cases in this section reveal that courts scrutinize carefully the necessity for RIF, although they can be flexible in applying appropriate law. The appropriate test in determining whether a school board's decision to RIF employees was arbitrary and capricious in light of a decline in revenues and students, is not whether its decision "was the best under the circumstances" but whether "the record contains relevant evidence that reasonably supports the Board's decision." In this Wyoming case a decision to RIF 5.5 positions was upheld, while under state law there was no requirement to realign teaching duties premised on seniority.[153] Similarly, a RIFed teacher who had failed to file written notice of appeal to the appropriate party within the ten-day statutory period lost his right to a hearing to challenge the seniority list.[154] A tenured teacher's termination, which had not conformed to a statutory requirement that the school board not vote on terminations because of RIF until after a teacher's hearing, was nonetheless upheld because evidence of RIF was clear and the teacher had suffered no harm to his reputation.[155]

Elimination of Position

Cases in this section tend to overlap with the issue of selecting the employees to be retained as discussed under the next section. In the absence of bad faith, fraud, or collusion a maintenance supervisor's civil service position could be abolished in the interest of economy and efficiency as part of a larger reorganization.[156] Reducing a teaching position from full-time to half-time because of declining enrollments did not amount to aboli-

152. Haley v. Hall, 733 F. Supp. 1275 (E.D. Ark. 1990).
153. Palmer v. Board of Trustees of Crook County School Dist. No. 1, 785 P.2d 1160, 1164 (Wyo. 1990).
154. Greene v. Pateros School Dist., 799 P.2d 276 (Wash. Ct. App. 1990).
155. Birrer v. Trustees, Wheatland County School Dist. No. 15, 786 P.2d 1161 (Mont. 1990).
156. Johnson v. Board of Educ. of City of Jamestown, 547 N.Y.S.2d 727 (App. Div. 1989).

tion of the position, but rather maintenance of the position on a part-time basis.[157]

Selection of Employees

Cases in this section deal with interpretation of state statutes. A tenured teacher, dismissed because of financial constraints, had been improperly dismissed under state statute where a position she was qualified to fill was occupied by a nontenured teacher at the same school in which she taught.[158] School districts that had entered into an agreement for a cooperative secondary program to be administered by a joint powers board did not have authority to use a joint seniority list to decide which teacher would be placed on unrequested leave of absence, where the teachers of one of the districts had not agreed in their master contract to use of the joint list.[159]

Realignment/Reassignment

Three cases indicate the primary role of state statute in this section. In Minnesota, school districts have a statutory duty to realign teachers placed on unrequested leave of absence because of declining enrollment; furthermore, if a negotiated bargaining agreement is in conflict with the statute by eliminating realignment, the statute prevails.[160] In Pennsylvania, a school board must take note of all certifications of an employee in reassignments but a board does not have to take note of all multiple certifications of all employees in order to retain the most senior employees.[161] In a rather complicated case involving two tenured teachers who had been employed for a number of years and then RIFed from those positions, the West Virginia Supreme Court determined that no seniority accrued in administrative positions for purposes of bumping other administrators, but that in reassigning former administrative personnel to teaching positions, seniority would be based on both teaching and administrative years.[162]

Employees prevailed in most cases with courts tending to protect employees with the greatest amount of seniority. Under Minnesota law, a school district could be required to realign teachers with less seniority in order to accommodate a teacher with more seniority on the unrequested leave of absence list.[163] A tenured teacher RIFed from a full-time P.E.

---

157. Gettinger v. Putnam/Northern Westchester Bd. of Coop. Educ'al Servs., 552 N.Y.S.2d 141 (App. Div. 1990).
158. Assad v. Berlin-Boylston Regional School Comm., 550 N.E.2d 357 (Mass. 1990).
159. *In re* Battaglia, 451 N.W.2d 46 (Minn. Ct. App. 1990).
160. *In Re* Bristol, 451 N.W.2d 883 (Minn. Ct. App. 1990).
161. Duncan v. Rochester Area School Bd., 571 A.2d 365 (Pa. 1990).
162. Board of Educ. of County of Harrison v. Bowers, 396 S.E.2d 166 (W. Va. 1990).
163. Harms v. Independent School Dist. No. 300, LaCrescent, 450 N.W.2d 571 (Minn. 1990).

position had to be re-hired for the half-time teaching position that replaced his former full-time position.[164] A state statute requiring realignment to assure that the more senior faculty are retained in positions for which they are certified did not permit the school board to exercise discretion in rejecting realignment where it considered such an act to be educationally unsound.[165] A high school principal, whose position had been eliminated through a RIF and who was also a tenured teacher, was entitled under state law to bump a nontenured teacher in an area of his teaching certification.[166] A part-time tenured teacher seeking to return to any available full-time teaching position was entitled under Illinois law to assert bumping rights against a new nontenured teacher hired to teach in plaintiff's area.[167]

One case involved nonteaching employees being treated differently from faculty. When school districts took over a cooperative educational services district, certified teaching assistants whose positions had been abolished as a result of the take over were not entitled under state statute to an offer of similar positions in the districts or to be placed on preferred employment eligibility lists because such statutory rights were conferred on teachers, not teaching assistants.[168]

Call-back Rights

Call-back rights tend to be controlled by state statutes. Under the Pennsylvania state Public School Code, a "transfer" of a program or class had not occurred when three math teachers were suspended for declining enrollments, even though the effect was to transfer responsibility for teaching math courses from the vocational-technical school, where the teachers had been employed, to public school districts. Had the court determined that a "transfer" had occurred the plaintiffs would have been entitled to statutory recall rights at the public high schools.[169] School nurses, who had taught in a practical school district nursing program for two consecutive years without receiving notice of dismissal, had acquired statutory tenure and were entitled to recall after the nursing program had been discontinued.[170] In a complex case involving interpretation of Minnesota state statutes and the terms of an inter-district cooperation agreement creating new teaching positions, a teacher, who had been placed on unrequested leave of absence prior to the interdistrict cooperation agreement, was

---

164. Harris v. Trustees, Cascade County School Dist. No. 6 and F, 786 P.2d 1164 (Mont. 1990).
165. Dallap v. Sharon City School Dist., 571 A.2d 368 (Pa. 1990).
166. Holmes v. Board of Trustees of School Dist. Nos. 4, 47 and 2, 792 P.2d 10 (Mont. 1990).
167. Deem v. Board of Educ. of Triad Community Unit School Dist. No. 2, Madison County, 558 N.E.2d 291 (Ill. App. Ct. 1990).
168. Anderson v. Cortland City School Dist., 554 N.Y.S.2d 769 (Sup. Ct. 1990).
169. Hahn v. Marple Newtown School Dist., 571 A.2d 1115 (Pa. Commw. Ct. 1990).
170. James v. Board of Educ. of School Dist. No. 189, E. St. Louis, 549 N.E.2d 1001 (Ill. App. Ct. 1990).

entitled to recall over teachers from the other district because the teacher in the first district had seniority.[171]

CONTRACT DISPUTES

Board Policies and Contract Stipulations

The nature of a school employee's contract and differing interpretations of the provisions in that contract tend to foster litigation. One case involved interpretation of a collective bargaining agreement. Four teachers who had resigned their positions between 1966 and 1978 and were rehired between 1981 and 1985 as new teachers on the salary schedule were entitled, under the current collective bargaining agreement, to credit for the prior years of teaching.[172] In an Arkansas case involving interpretation of conflicting contractual provisions, a court determined that coaches were entitled to additional pay for days of coaching beyond 194 days under a school district's extended contract provision in its salary schedule even though they also had received a salary supplement to perform coaching duties.[173]

A general requirement in law is that a person cannot recover compensatory and incidental damages for breach of contract without attempting to mitigate damages. In Arizona, a state appeals court has found that two wrongfully terminated tenured teachers had adequately mitigated damages where one had taken employment at a boarding school at a substantially lower salary and the second had unsuccessfully made fifty-nine job contacts.[174] The remainder of the cases where employees prevailed involved interpretation of employment contracts, most of which also involved state statutes. Under Ohio statutes, teachers who perform extracurricular activities are entitled to additional service contracts and the school board abused its discretion when it offered such a contract to the yearbook advisor, but not to the newspaper advisor.[175] A superintendent who had nominated herself to fill a vacant principal's job after losing a re-election bid as superintendent had not abused her authority under state statute interpretation making matters of controversy within one local school board a "local controversy" requiring exhaustion of administrative remedies.[176] In one case involving contract only, a former instructor in a high school Junior Reserve Army Training Corps was entitled to back wages based on a retroac-

---

171. Sherek v. Independent School Dist. No. 699, 449 N.W.2d 434 (Minn. 1990).
172. Centennial School Dist. v. Centennial Educ. Ass'n, 576 A.2d 99 (Pa. Commw. Ct. 1990).
173. Helena-West Helena School Dist. #2 v. Randall, 796 S.W.2d 586 (Ark. Ct. App. 1990).
174. Britt v. Red Mesa Unified School Dist. No. 27, County of Apache, 799 P.2d 9 (Ariz. Ct. App. 1990).
175. Wolf v. Cuyahoga Falls City School Dist. Bd. of Educ., 556 N.E.2d 511 (Ohio 1990).
176. Bacon v. Brewer, 395 S.E.2d 383 (Ga. Ct. App. 1990).

tive Army promotion where his wage formula was dependent on the rank of officers.[177]

One case involved the difficult issue of contract representations and the authority of the person making the statements. An applicant for a junior high teaching position, who had signed a contract with the school district but whose contract was rejected by the school board because of the applicant's difficulties with certification and failure to pass the National Teachers Exam, nonetheless had a triable cause of action for misrepresentation of authority against the school principal who had interviewed him and assured him that the school board would approve the contract. Even though the applicant had no cause of action against the school board, the school principal could be liable in Arkansas under the legal principle that "an agent who contracts in the name of his principal without authority, so that the principal is not bound, may be personally liable to the other contracting party."[178]

Some contract decisions occurred adverse to the employee because the employee failed to act in a timely manner. A teacher on an annual contract who failed to accept the school board's offer of a contract for the following year within the board's two week requirement had not accepted the contract offer in timely fashion and therefore her contract was terminated at the end of the current year.[179] Although a teacher resignation can be withdrawn until accepted or acted upon by a school board, a teacher lost the right to rescind his resignation where the school board had hired a replacement. Filling the teacher's position impliedly accepted the resignation.[180] An employee, who had signed a "Release of Claims" form in consideration for a sum equal to two weeks pay, could not maintain an action for wrongful discharge as a matter of law in Michigan; the tender to refund the money did not occur until more than one year later.[181]

One case involved the circumstances of contract interpretation. A provision in an athletic director's contract which permitted assignment of duties was not adhesive in nature and therefore assignment of two additional classes to the athletic director in a time of financial crisis was warranted under the contract.[182]

School boards generally have discretion in hiring or assigning employees. A high school principal who had been transferred from his principal position to a central office position was not entitled to the principalship as a matter of right when his successor resigned. The principal

---

177. Williams v. Orleans Parish School Bd., 560 So. 2d 642 (La. Ct. App. 1990).
178. Hart v. Bridges, 786 S.W.2d 589, 592 (Ark. Ct. App. 1990).
179. Petrini v. United States, 19 Ct. Cl. 41 (1989).
180. Mullen v. Fayettesville-Perry Local School Dist. Bd. of Educ., 557 N.E.2d 1235 (Ohio Ct. App. 1988).
181. Stefanac v. Cranbrook Educ'al Community, 458 N.W.2d 56 (Mich. 1990).
182. Trevino v. Board of Trustees of W. Oso Indep. School Dist., 783 S.W.2d 806 (Tex. Ct. App. 1990).

could not use a *writ of mandamus* to compel the school board to place him back in the principal position where school boards have discretion in hiring and assignments and the principal's claims regarding superior seniority and prior experience were not the only factors to be considered by the school board in its decision.[183] However, in another case, a transfer was held to be arbitrary and unfair where the board's proffered reason for a teacher's transfer pertaining to smaller class size in the new school to which the teacher was transferred had no basis in fact to any problems in the old school.[184]

Administrative Regulations and Statutory Provisions

Cases under this section concerned application of state regulations or statutes and tended to be resolved in favor of employees. Assignment of guidance counselors and a librarian by a board of education to substitute for absent classroom teachers was not an emergency measure under a state statute permitting the superintendent of schools to act in case of emergency as the best interests of the school demand where there was no showing that the school district was not able to afford hiring substitute teachers.[185] A tenured teacher selected to serve on the California Commission on Teacher Credentialing was entitled to leave without loss of compensation under a state statute where an employee serves on certain commissions or boards "whose purposes and activities are to further public education."[186] In a contract salary dispute involving both a State Board of Education schedule of minimum salaries and a local board of education salary scale, the Georgia Appeals Court determined that salaries which exceed the state minimum are not in themselves correct where the local school board has not credited teachers with all of the experience to which they are entitled under the local salary scale.[187] In an unusual case involving incorrect advertising of a position, the West Virginia Supreme Court has held that under its statutes an athletic trainer is an extracurricular function and therefore a job position advertisement for "physical education teacher and athletic trainer" represented an improper joinder. This case arose because a rejected applicant was willing to teach physical education but not serve as athletic trainer.[188]

Several cases involved teacher funds as property interests as affected by divorce or bankruptcy. The Montana Supreme Court determined that a deceased teacher's retirement account was a marital asset, part of which

183. Tenney v. Board of Educ. of the County of Barbour, 398 S.E.2d 114 (W. Va. 1990).
184. Alabama State Tenure Comm'n v. Dallas County Bd. of Educ., 569 So. 2d 742 (Ala. Civ. Ct. App. 1990).
185. Randolph County Bd. of Educ. v. Scalia, 387 S.E.2d 524 (W. Va. 1989).
186. Wiman v. Vallejo City Unified School Dist., 271 Cal. Rptr. 142, 143 (Ct. App. 1990).
187. Muscogee County Bd. of Educ. v. Boisvert, 396 S.E.2d 303 (Ga. Ct. App. 1990).
188. Cruciotti v. McNeel, 396 S.E.2d 191 (W. Va. 1990).

could be awarded to a former wife even though a named beneficiary of the account was already receiving monthly benefits.[189] A school teacher's pension was marital property which was subject to attachment under state law in connection with division of property in divorce and ERISA did not apply to prevent such attachment.[190] Under Missouri law, the pension funds paid into the state's Public School Retirement System for a teacher who had filed a Chapter 7 petition in bankruptcy were entirely exempt from his bankruptcy estate.[191] Similarly in Minnesota, funds contributed by a bankrupt teacher under Minnesota's Teachers Retirement Fund are exempt from execution by creditors.[192]

TENURE

"Tenure" is a statutory right to continuing contract status which also entitles tenured employees to procedural due process protection and to termination "for cause." Certificated personnel such as teachers and principals can acquire tenure in most states and noncertificated personnel can acquire tenure in some states. Some states permit teacher or administrator tenure to attach if a person moves vertically from one category to another, but in other states a probationary period must be served after any change in certificated category. It is more likely that certificated administrators will already be certificated teachers for purposes of vertical movement than vice-versa. Tenure transfer from one district in a state to another is controlled by state law.

Tenure Status

Tenure status usually hinges on application of state law to difficult factual situations. A teacher's first fourteen month appointment to a state school had to be counted under state law toward the three-year probationary period for tenure even though she was not an employee for the entire probationary period of a school district.[193] A teacher who had taught one year in a Department of Health and Human Services (DHHS) school and then three years as a probationary teacher could not add the one DHHS year to create tenure for herself because the DHHS school did not require teachers to be certified.[194] In a case of procedural note, a four month statute of limitations in New York to challenge a principal's revocation of his prin-

---

189. *In re* Marriage of Butler, 795 P.2d 467 (Mont. 1990).
190. Graham v. Graham, 578 A.2d 459 (Pa. Super. Ct. 1990).
191. *In re* Olson, 108 B.R. 232 (W.D. Mo. 1989).
192. *In re* McKeag, 111 B.R. 815 (D. Minn. 1990).
193. Perkins v. State Bd. of Elementary and Secondary Educ., 562 So. 2d 930 (La. Ct. App. 1990).
194. Perkins v. State Bd. of Elementary and Secondary Educ., 552 So. 2d 735 (La. Ct. App. 1989).

cipal license and reversion to his assistant principal license did not begin to run until he had received official notice of reversion and thus his lawsuit had been timely filed.[195]

Tenure by Default or Acquiescence

A teacher may seek to secure tenure by taking advantage of a school district's error or oversight. Under Kentucky law a teacher who had served three years under half-time contracts, but who actually ended up during each year teaching full-time, was entitled upon issuance of the fourth year half-time contract to tenure. Failure of the school district to give written notification of nonrenewal prior to issuance of the fourth year contract entitled the teacher to tenure.[196]

CERTIFICATION

Certification can refer to rules or regulations, the actual certificate as indicia of one's professional status, or the process by which one secures such a certificate. In a divorce case, a teaching certificate was held to have no separate asset value for purposes of distribution pursuant to a divorce proceeding where the license was considered to have merged into a fifteen-year teaching career and that career had proceeded to a point where it had produced assets capable of valuation.[197]

Certification Standards

Professional certificates are usually granted as the result of examination or completion of academic requirements. Failure of the examination or failure to maintain one's professional qualifications may adversely affect certification status. A newly hired teacher who failed to provide by the opening day of school a certificate showing he had passed the Texas Examination of Current Administrators and Teachers (TECAT) did not have an action for breach of contract when his position was filled even though he passed the TECAT after school was in session for six weeks and he sought to get his position back.[198] However, a black elementary teacher who had been nonrenewed during a school consolidation because she had failed the Alabama State Department's test required to receive teacher certification was entitled to reinstatement, back pay, and attorney

195. Orellanes v. Board of Educ., 561 N.Y.S.2d 242 (App. Div. 1990).
196. Board of Educ. of Harrodsburg v. Powell, 792 S.W.2d 376 (Kent. Ct. App. 1990).
197. Parlow v. Parlow, 548 N.Y.S.2d 373 (Sup. Ct. 1989).
198. Grand Prairie Indep. School Dist. v. Vaughan, 792 S.W.2d 944 (Tex. 1990).

fees as a result of a consent decree that the test had a discriminatory impact. The state department's certification test fell "so far below acceptable and reasonable standards that the test could not be reasonably understood to do what it purport[ed] to do."[199]

The state may have discretion in refusing a certificate. A state Director of Revenue's decision to refuse issuance of a school bus permit to an applicant convicted of wife and child abandonment and nonsupport was upheld as within the statutory prohibition of permit issuance to persons convicted of "an offense against the family . . . or of any similar crime."[200]

Local school boards may or may not have discretion in hiring noncertificated employees or employees certificated in areas other than the open position. Although county school boards in West Virginia have substantial discretion in matters related to hiring, a school board abused its discretion by hiring a teacher certified only in areas of general science and mathematics to fill a gifted education opening instead of a second candidate who was specifically qualified by the state to teach gifted education.[201] However, the Wisconsin Court of Appeals upheld the use of instructors in a vocational-technical adult education school who did not have State Department of Public Instruction certification for the reason that a rational basis existed for treating vocational adult education teachers, who also teach public school students, differently from other public school teachers.[202]

Decertification, Revocation, or Suspension

Certification agencies have broad, although not unlimited, discretion in penalizing persons holding certificates. A teacher discharged from his position as a sixth grade teacher because of improper sexual contact with female students was a person "charged with gross neglect of duty" under Teacher Standards and Practices Commissions' rules justifying denial of reinstatement of his teaching certificate.[203] In upholding the revocation of a teacher's license to teach by the State Board of Education, the New Hampshire Supreme Court approved, under the doctrine of *collateral estoppel*, the State Board of Education's reliance upon the prior findings of fact made by the Canadian Province of New Brunswick which had the previous year revoked the teacher's credentials for lack of good moral character.[204] In a teacher revocation hearing, the transcript of a former student's trial testimony describing rape could be used to provide evidence of the teacher's immorality and misconduct in office even though the con-

---

199. Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 825 (M.D. Ala. 1989).
200. Callier v. Director of Revenue, State of Mo., 780 S.W.2d 639 (Mo. 1989).
201. Johnson v. Cassell, 387 S.E.2d 553 (W. Va. 1989).
202. Green Bay Educ. Ass'n v. State Dep't of Pub. Instruction, 453 N.W.2d 915 (Wis. Ct. App. 1990).
203. Reguero v. Teacher Standards and Practices Comm'n, 789 P.2d 11 (Or. Ct. App. 1990).
204. Petition of Breau, 565 A.2d 1044 (N.H. 1989).

viction for rape had been reversed on grounds that an expert witness for the state had invaded the province of the jury by stating that the victim was credible and reliable.[205]

However, attempts to adversely affect employees' certification have been rejected for a variety of legal reasons. A teacher's teaching certificate had been improperly revoked where the state board of education had used evidence underlying criminal drug charges against the teacher, charges which were ultimately dismissed and expunged.[206] The Superintendent of Education in Illinois did not have authority to revoke a teacher's certificate after the Teacher Certification Board had voted that the teacher's certificate would not be revoked.[207] In a case testing the state's burden of proof in recalling a bus driver's license, a state court in Pennsylvania determined that a state regulation disqualifying drivers with seizure disorders meant that the Department of Transportation was required to prove that the driver's "seizure disorder was likely to cause loss or impairment of consciousness or an inability to safely drive a school bus."[208] A teacher holding a state teaching certificate which was automatically revoked pursuant to state regulation requiring invalidation of a certificate if a testing company invalidates a test score was deprived of liberty and property interests, as well as procedural due process rights to notice and to a hearing.[209] In a different vein, a teacher who was discharged as a result of failing a certification exam which was required to continue teaching, did not leave employment voluntarily and was not discharged as result of misconduct, and thus was eligible for unemployment compensation.[210]

---

205. Ulrich v. Indiana, 555 N.E.2d 172 (Ind. Ct. App. 1990).
206. Ambus v. Utah State Bd. of Educ., 800 P.2d 811 (Utah 1990).
207. Hunt v. Sanders, 554 N.E.2d 285 (Ill. App. Ct. 1990).
208. Commonwealth Dep't of Transp., Bureau of Driver Licensing v. Chalfant, 565 A.2d 1252 (Pa. Commw. Ct. 1989).
209. Brown v. South Carolina State Bd. of Educ., 391 S.E.2d 866 (S.C. 1990).
210. Gulf County School Bd. v. Washington, 567 So. 2d 420 (Fla. 1990).